IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 6, 2007 Session

CHERRETHA YVONNE TATE v. BURLEY CHAMPION

Direct Appeal from the Circuit Court for Hamilton County
No. 04C1653 Hon. L. Marie Williams, Circuit Judge

No. E2006-01033-COA-R3-CV - FILED APRIL 30, 2007

Mr. Champion (the "Landlord") had several trenches dug in his tenant's yard to repair a leaking water pipe. After repairing the pipe, the Landlord did not cover the trenches, and Ms. Tate (the "Tenant") complained repeatedly. Over time, grass grew over the trenches. Three months after the trenches were dug, the Tenant, after returning from a shopping trip and carrying two bags, fell in one of the trenches and was injured. The Tenant sued the Landlord for negligence. The trial court granted the Landlord's motion for summary judgment, finding that the uncovered trench was open and obvious and therefore, it was not foreseeable to the Landlord that the Tenant would step into a known hazard. After careful review, we find that the Landlord owed a duty of reasonable care to the Tenant; that the Landlord did not affirmatively negate an essential element of the Tenant's proof, i.e., the Landlord's duty of care to the Tenant; and, as a result, summary judgment was inappropriate. We vacate and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

W. Gerald Tidwell, Jr., Chattanooga, Tennessee, for the Appellant, Cherretha Yvonne Tate.

Amanda G. Branam, Chattanooga, Tennessee, for the Appellee, Burley Champion.

OPINION

I. Background

Reviewing the facts in a light most favorable to the Tenant and drawing all reasonable inferences in her favor, as we are required to do when reviewing the grant of a motion for summary judgment, ***Robinson v. Omer****,* 952 S.W. 2d 423, 426 (Tenn. 1997)*,* ***Byrd v. Hall***, 847 S.W.2d 208, 210-11 (Tenn. 1993), we are presented with a Landlord who had several trenches dug in his Tenant's yard to replace leaking water pipes and then left those trenches uncovered. One large trench spanned the entire width of the front yard, except for the area occupied by the sidewalk leading to the front door, while other smaller trenches were scattered around the yard. Over time, grass grew over the holes, partially obscuring them from view. The Tenant tried repeatedly to have the Landlord fill the trenches with dirt; on numerous occasions she called both the Landlord and his assistant and also lodged complaints with the Chattanooga Housing Authority, the entity responsible for paying her rent. Her efforts were unsuccessful.

On October 25, 2003, approximately three months after the Landlord's worker dug the trenches, the Tenant fell in one of the trenches in her yard. The accident happened just after the Tenant and her sister returned to the home from a shopping errand in preparation for a birthday party that day for one of the Tenant's children. Her sister parked the vehicle in front of the house, to the right of the sidewalk. During her deposition, the Tenant described the accident as follows:

> We were unloading the car and I stepped out with two bags. And as soon as I stepped out, I stepped in the hole and I hit the ground. And that was basically it. . . . I opened the door, took a couple of steps, and then I stepped in the hole.

The Tenant described the hole as being three to four inches deep. As a result of the fall, she suffered injuries to her left foot, ankle, and wrist, which required extensive medical treatment. The Tenant filed suit against the Landlord, alleging that he was negligent in leaving open trenches in the yard after the pipe repairs were completed. The Landlord filed a motion for summary judgment, alleging that he owed no duty to the Tenant because the trenches were open and obvious, and it was not foreseeable that she would step into one of them and injure herself. The Landlord's motion was supported by the Tenant's discovery deposition, the lease agreement, and a photograph of the house and yard. The trial court granted the Landlord's motion for summary judgment, finding that the Landlord did not owe a duty of care to the Tenant. The Tenant appeals.

II. Issue

The sole issue presented for review, as restated, is whether the trial court erred by granting summary judgment to the Landlord based on its conclusion that the Landlord did not owe a duty of care to the Tenant.

III. Standard of Review

Summary judgment is appropriate only when the moving party demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04. When reviewing a motion for summary judgment, this Court is required to view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. See ***Robinson v. Omer***, 952 S.W.2d at 426; ***Byrd v. Hall***, 847 S.W.2d at 210-11. The burden of proof rests with the moving party, who must establish that its motion satisfies these requirements. ***Staples v. CBL & Associates, Inc.***, 15 S.W.3d 83, 88 (Tenn. 2000). If the moving party makes a properly supported motion, the burden shifts to the nonmoving party to establish the existence of disputed material facts. *Id.* (citing ***Byrd v. Hall***, 847 S.W.2d at 215). If, however, the moving party fails to make a properly supported motion, "the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail." ***Staples v. CBL & Associates, Inc.***, 15 S.W.3d at 88.

The Tennessee Supreme Court offered the following guidance regarding a moving party meeting his or her burden for summary judgment purposes:

> The moving party could, for example, make this required showing in several ways. First, the moving party could affirmatively negate an essential element of the nonmoving party's claim, i.e., a defendant in a negligence action would be entitled to summary judgment if he convinced the court that he owed no duty to the plaintiff. Second, the moving party could conclusively establish an affirmative defense that defeats the nonmoving party's claim, i.e., a defendant would be entitled to summary judgment if he demonstrated that the nonmoving party cannot establish an essential element of his case.

Byrd v. Hall, 847 S.W.2d at 216 n.5.

IV. Analysis

To establish her negligence claim, the Tenant is required to prove: (1) a duty of care owed to her by the Landlord; (2) a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause. ***Coln v. City of Savannah***, 966 S.W.2d 34, 39 (Tenn. 1998) (citing ***Bradshaw v. Daniel***, 854 S.W.2d 865, 869 (Tenn. 1993)). Whether a duty of care is owed is a question of law to be decided by the trial court. *Id.*

In order to prevail on his motion for summary judgment, the Landlord must affirmatively negate an essential element of the Tenant's claim or conclusively establish an affirmative defense. The Landlord argued that it was not foreseeable that the Tenant would fall in a hole that was open and obvious to her. The trial court agreed, finding that the Landlord did not owe a duty of care to

the Tenant because her injury was not foreseeable, stating as follows:

> The issue of defendant's duty is controlled by the foreseeability of harm to someone in the plaintiff's position. ***Wilson v. Gables-Tennessee Properties, LLC***, 2004 WL 2848387 (Tenn. Ct. App.). The plaintiff in this case had equal knowledge of the risk of harm as the defendant. It was not foreseeable that she would put herself in the position of being injured because of a known hazard about which she had complained repeatedly when there was a sufficiently safe alternate route.

Our initial inquiry is: did the Landlord owe a duty of care to the Tenant? As a preliminary matter, we note that landlords generally owe a duty of reasonable care to tenants. *See, e.g.,* ***Jolly Motor Livery Corp. v. Allenberg****,* 221 S.W.2d 513, 515 (Tenn. 1949); ***Wilson v. Gables-Tennessee Properties, LLC***, 138 S.W.3d 154, 157 (Tenn. Ct. App. 2004); ***Arzanzarrin v. Johnstown Properties, Inc.***, No. 01-A-01-9406-CV00259, 1994 WL 672675, at *3 (Tenn. Ct. App. M.S., filed Dec. 2, 1994). However, for a long period of time, Tennessee courts refused to hold a property owner liable for an injuries sustained as a result of dangers that were "obvious, reasonably apparent, or as well known to the invitee [or licensee] as to the owner." ***Coln v. City of Savannah***, 966 S.W.2d at 40. This "open and obvious" rule was often expressed in terms of duty, such that a property owner had no duty to warn against an obvious or known danger. *Id.*

In ***Coln v. City of Savannah***, 966 S.W.2d 34, the Tennessee Supreme Court recognized that the "open and obvious" rule produced results which were often inconsistent with the comparative fault principles adopted in this state. To resolve this dilemma, the Supreme Court established the following rule to guide courts confronted with the question of whether a person injured by an "open and obvious" hazard was owed a duty of care by the property owner:

> [W]e conclude that an open and obvious danger does not automatically result in a finding of no duty and therefore no landowner liability. As in any negligence action, we think a risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by a defendant's conduct outweigh the burden upon the defendant to engage in alternative conduct that would prevent the harm.

Coln**,** 966 S.W.2d at 37. In reaching its conclusion, the ***Coln*** court adopted the Restatement (Second) of Torts, § 343A, which states:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement (Second) of Torts, § 343A. The ***Coln*** court also quoted a comment to § 343A, which provides additional guidance on the issue of foreseeability as part of the duty analysis:

> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.

Restatement (Second) of Torts, § 343A cmt. f. In the case at bar, the Tenant had just stepped out of her sister's car carrying two bags of groceries, guests had already arrived at her house for her son's birthday party, and she was trying to finish the last-minute preparations for the celebration. Given the Tenant's situation at that time, it is reasonable to expect that her attention might have been diverted or that she could have temporarily forgotten about the holes in her yard.

The trial court relied on ***Wilson***, 138 S.W.3d 154, in concluding that the Landlord did not owe a duty of care to the Tenant. In ***Wilson***, the plaintiff lived at an apartment complex which provided a trash compactor for the use of its residents. A concrete sidewalk led from the driveway to the trash compactor, which residents routinely used when they dropped off their garbage. *Id.* at 155. The landlord also installed a limestone gravel walkway adjacent to the concrete sidewalk for the purpose of providing access to the compactor for the maintenance staff. To keep the limestone from getting into the grass and landscaping beside the walkway, metal landscape edging bordered the limestone walkway on both sides. *Id.* The tenant, who was aware of the metal edging and had lived at the apartment complex for more than two years, decided to carry her trash across the grass to the limestone walkway to access the compactor. She tripped over the metal landscape edging and fell, injuring her elbow. The tenant sued the owner of the apartment complex and the company that installed the metal landscape edging for negligence. *Id.* The trial court granted summary judgment to the defendants, finding that there was no duty because it was not foreseeable that a tenant would trip and fall over a known obstacle. *Id.* at 157. We affirmed the trial court's grant of summary judgment.

However, this case is distinguishable from the facts presented in ***Wilson***. The metal landscaping edging in ***Wilson*** was a permanent fixture on the property intended to keep the limestone gravel in the maintenance walkway from being washed or kicked into the grassy area of the lawn. Furthermore, the maintenance walkway was not intended to be used by residents of the apartment complex; instead, a concrete sidewalk had been provided for this purpose. In the case at bar, the trenches in the yard were not – or should not – have been permanent fixtures; rather, they were the result of repairs made to subterranean water lines. It is certainly foreseeable that a tenant

will walk across his or her own yard; indeed, even the ***Wilson*** court stated that "the foreseeability of a tenant walking across the grass is not the same as the foreseeability of a tenant tripping on the landscaping edging." ***Wilson***, 138 S.W.3d at 157. In this case, the Tenant was not even walking across the yard. The only proof before us is that she got out of the car with her shopping bags, took a couple of steps, and then stepped into a hole. It is foreseeable that a tenant may become momentarily distracted or forgetful when carrying in shopping bags and, as a result, might inadvertently step in one of the many holes in the yard, especially when the holes are partially obscured by grass.

Under multiple legal theories, we find that there was a duty on the Landlord's part to maintain the yard. Applying the ***Coln*** balancing test, it was certainly foreseeable that someone might walk across the front yard or take a few steps into the yard and fall into one of the holes, especially since the holes had been partially covered by grass that had grown over them in the three months they had remained open. The gravity of harm from such an accident could be severe, as evidenced by the Tenant's injuries, which required surgery and resulted in her confinement to a wheelchair for more than two months. On the other hand, we must look at the burden to the Landlord of alternative measures that might have prevented such an accident. The Landlord could have filled the trenches with dirt, which appears to be a simple and cost-efficient means of eliminating the hazardous condition from the yard. Therefore, we find that the Landlord owed a duty to the Tenant under the standard set forth in ***Coln*****.** Furthermore, the Landlord obligated himself to "make necessary repairs to the exterior" of the property in the lease between himself and the Tenant. This would provide an additional ground for holding that the Landlord owed a legal duty to the Tenant to make sure that the yard was reasonably safe.[1] Finally, a landlord who undertakes to repair a defect to his property, whether by himself or through his agent, has a duty to complete the repairs properly. ***Wilcox v. Hines***, 46 S.W. 297, 303 (Tenn. 1898); *see also* ***Sneed v. Henderson***, 366 S.W.2d 758, 764 (Tenn. 1963) (holding that when property owners sent their agent to repair a tenant's refrigerator, the owners "owed a duty to do that which a man exercising ordinary and reasonable care would have done under like to similar circumstances. They also owed a duty not to omit the doing of any act which a man of ordinary care would not omit to do under the same standard."). Thus, for many reasons, the Landlord owed a duty of care to the Tenant under the circumstances in this case.

The Landlord based his summary judgment motion on his assertion that he did not owe a duty of care to the Tenant because it was not foreseeable that she would step into one of the trenches in the yard. If the Landlord did not owe a duty of care to the Tenant, then the Landlord must prevail on summary judgment, because he would have negated one of the essential elements of the Tenant's negligence claim. However, we find that the Landlord owed a legal duty to the Tenant. Reviewing the record in light of the remaining elements of the Tenant's cause of action, we see nothing that would entitle the Landlord to summary judgment. The Landlord has failed to negate an essential

[1] Although this was not argued by either party at trial or in briefs before this Court, Hamilton County is subject to the Tennessee Uniform Residential Landlord and Tenant Act, Tenn. Code Ann. § 66-28-101 *et seq*. Under the Act, landlords have a duty to, among other things, "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition" and "keep all common areas of the premises in a clean and safe condition." Tenn. Code Ann. § 66-28-304(a)(2)-(3).

element of the Tenant's claim or establish an affirmative defense. The Tenant's deposition, which was attached in its entirety to the Landlord's motion for summary judgment, describes her injuries and the medical treatment that she has endured. The Tenant also describes her fall into one of the trenches that was dug by the Landlord's assistant, which provides evidence of a breach of the Landlord's duty to the Tenant, as well as the cause in fact and legal cause of her injuries.

We note that the Tenant did not file any affidavits in response to the Landlord's motion for summary judgment, but merely disputed a portion of the Landlord's statement of undisputed facts without setting forth specific facts on which she relied.[2] Because we find that the Landlord did not meet his burden in the summary judgment analysis, the burden never shifted to the Tenant to bring forth evidence establishing a genuine issue of material fact for trial.

After careful review of the materials submitted by the Landlord and the record as a whole, we hold that the Landlord did not meet his burden under the summary judgment standard. Therefore, his motion for summary judgment should have been denied.

V. Conclusion

We hold that the trial court erred by granting summary judgment to the Landlord, Mr. Champion. We vacate and remand this case to the trial court for further proceedings consistent with this opinion. Costs of appeal are taxed against the Appellee, Mr. Champion.

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SHARON G. LEE, JUDGE

[2] In his "Statement of Material Facts to Which There Are No Genuine Disputes," the Landlord states that the Tenant "chose not to use this walkway, and instead walked across what she knew to be a potentially hazardous hole." The Landlord references the Tenant's complaint in support of this statement. We note the complaint does not contain this statement. The undisputed facts in the record are that the Tenant did not make a conscious decision to avoid using the walkway and instead walk across a dangerous hole, but rather, she got out of a vehicle and took a couple of steps and fell in a hole.